# In the United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

N. RUDEBECK, R. H. RAMSAY and DORA A. RAMSAY,
*Petitioners,*

vs.

W. P. SANDERSON as Trustee in in Bankruptcy of the NONPAREIL CONSOLIDATED COPPER COMPANY, a Corporation, Bankrupt, and NONPAREIL CONSOLIDATED COPPER COMPANY, a Corporation,
*Respondents.*

**No. 2624**

IN THE MATTER OF NONPAREIL CONSOLIDATED COPPER COMPANY, BANKRUPT.

Upon Review from the United States District Court,
For the Western District of Washington,
Northern Division.

# Brief of Petitioners

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### STATEMENT OF THE CASE.

This is a proceeding to review an order entered by the United States District Court for the Western District of Washington, Northern Division, dismissing certain petitions of N. Rudebeck, R. H. Ramsay and the intervening petition of Dora A. Ramsay filed in the Matter of the Nonpareil Consolidated Copper Co., a Bankrupt, in the said Dis-

trict Court, in which petitions said petitioners prayed for an order vacating the adjudication in bankruptcy of the said Nonpareil Consolidated Copper Company, a Washington corporation.

Petitioners allege that they are respectively stockholders in the said Nonpareil Consolidated Copper Company and were such stockholders previous to and at the time of the filing of the petition in bankruptcy in the said district court; that the said petition in bankruptcy was made and filed without any authorization on the part of the stockholders of said corporation and without notice to the stockholders; that the District Court did not have jurisdiction to make and enter said order of adjudication, on the ground and for the reason that the stockholders of the corporation never authorized the making and filing of the petition admitting insolvency; that the petition in bankruptcy was made and filed in fraud of the petitioners as such stockholders and other stockholders similarly situated, and that the petitioners herein and the other stockholders of said corporation have a subsisting interest as such stockholders in the assets of said corporation; that among the assets of the corporation there are 470 acres of valuable timber land on which there is situated about 32 million feet of timber worth at least $2.00 per thousand, which the trustee has attempted to sell and that the sale thereof was set for confirmation for June 28, 1915, and unless ordered and restrained by the court the said sale of said assets of said corporation would be confirmed

and said property delivered to the purchaser thereof, to the great loss and detriment of the said corporation and of the petitioning stockholders, N. Rudebeck, R. H. Ramsay and Dora A. Ramsay and other stockholders similarly situated. (Record, pp. 17 to 26.) Upon filing the petitions the court made an order staying the sale of the assets and set a date for the hearing of said petitions. The trustee in bankruptcy thereupon served and filed motions to dismiss the said petitions to vacate the adjudication and also moved to dissolve the restraining order. (Record, p. 36.) The grounds of the motion for dismissal were that it appears from the record and the petitions to vacate that the facts therein stated are insufficient to constitute a valid cause of action or to entitle the petitioners to the relief therein prayed for, or to any relief. Upon hearing being had on said motions, the court entered the order dismissing the petitions to vacate. (Record, p. 37.) This decision and order of the district court the petitioners bring here for review.

## SPECIFICATIONS OF ERROR.

The District Court erred in making and entering the order of July 8, 1915, dismissing the said petitions of N. Rudebeck, R. H. Ramsay and the intervening petition of Dora A. Ramsay to vacate the adjudication in bankruptcy and in dissolving the order staying the sale of the assets of said corporation.

## BRIEF OF THE ARGUMENT.

### I.

The point of law raised by the appellant is that it appears from the face of the record in the bankruptcy proceedings of the Nonpareil Consolidated Copper Company that the adjudication in bankruptcy is void because the stockholders of the corporation never authorized the making or filing of the voluntary petition in bankruptcy wherein the corporation attempts to admit that it owes debts which it is unable to pay in full and prays that it may be adjudicated by the court to be a bankrupt. The petition in bankruptcy was executed by the "Nonpareil Consolidated Copper Company (Seal), By Simon P. Ecki, President." In the verification to the petition made by Simon P. Ecki as such president, he avers that he "was duly authorized by resolution of the board of trustees of the said corporation to execute the foregoing petition for and in behalf of the said corporation for the purposes therein set forth." (Record, pp. 13 to 15.) It therefore clearly appears that the authority to execute the petition came from the trustees. This positive averment precludes any presumption of authorization by the stockholders.

*In re Jefferson Casket Co.*, 182 Fed. p. 689.

It is an established principle of law in this circuit that the board of trustees of a corporation are

without any power to make the necessary admission in writing under Sec. 3a (5), 30 Stat. 546, as amended by Act February 5, 1903, c487, s2 Stat. 797, that the corporation owes debts which it is unable to pay in full and that it is willing to surrender all of its property for the benefit of its creditors. But that this authorization must come from the stockholders.

*In re Quartz Gold Mining Co.*, 157 Fed. p. 243.

*In re Southern Steel Co.*, 169 Fed. p. 702.

*Rem. on Bankruptcy*, Vol. 2, pp. 278, 279.

*In re Bates Machinery Co.*, 91 Fed. p. 625.

The case of *In re Quartz Gold Mining Co., supra*, involved the construction of the Oregon statutes upon the question as to where was vested the authority to make the necessary written admission of insolvency, and the Court held that the authority rests only in the stockholders.

In the case of *Van Emon et al., vs. Veal*, 158 Fed. p. 1022, this court affirmed the decision *In re Quartz Gold Mining Co., supra*, and say: "We have carefully considered the question involved and find no error in the judgment. Our views are fully expressed in the opinion of the District Court filed in the court below November 18, 1907, and we adopt the same as the opinion of this court. The judgment is affirmed."

The Washington statutes are practically identical with those of Oregon in respect to corporate

action, and method of dissolution and the increase and decrease of capital stock. In Washington the statutes provide the method of dissolution (2 Rem. & Bal. Code, Sec. 3708), namely, by resolution of a two-thirds vote of the stockholders, to-wit:

"Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation."
* * *

The Oregon statute cited by Judge Wolverton *In re Quartz Gold Mining Co., supra*, Sec. 5070 Misc. Laws Ore (B. & C. Comp.), as amended by Sess. Laws 1903, p. 41, s3, is as follows:

"Any corporation organized under the provisions of this chapter (pertaining to private corporations) may, at any meeting of the stockholders which is called for such purpose, by vote of the majority of the stock of any such corporation, increase or diminish its capital stock, or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property and dividing its capital stock in any manner it may see proper."

In Washington corporate stock can only be increased or diminished by a vote of two-thirds of all of the shares of stock of the corporation:

"Any company incorporated under this chapter may, by complying with the provisions herein contained, increase or diminish its capital stock to any amount which may be deemed sufficient and

proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum to which the capital is proposed to be diminished such amount shall be satisfied and reduced so as not to exceed the diminished amount of the capital. * * *

"Whenever it is desired to increase or diminish the amount of capital stock, a meeting of the stockholders shall be called, by a notice signed by at least a majority of the trustees, and published at least eight weeks in some newspaper published in the county where the principal place of business of the company is located, or if no newspaper is published in the county, then the newspaper nearest thereto in the state, which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital, and a vote of two-thirds of all the shares of the stock shall be necessary to increase or diminish the amount of capital stock." (2 Rem. & Bal., Secs. 3704, 3705.)

The trustees do not have power to declare any dividends except from the net profits, nor can they divide, withdraw, or in any way pay to the stockholders any part of the capital stock, nor reduce the capital stock of the company except in the manner provided by statute, or the articles of incorporation, or by-laws:

"It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and

in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, that this section shall not be construed to prevent division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter." (2 Rem. & Bal. Code, Sec. 3697.)

The stockholders form an integral part of a corporation and as such are a part of the company.

*Graham v. Boston-Hartford E. R. R. Co.*, 118 U. S.; 30 Law Ed. 196.

Quoting from page 205, "the plaintiff and all the shareholders whom he represents form an integral part of the corporation and as such are parties to the bankruptcy proceedings."

Where it appears from the face of the record that there is a lack of jurisdiction the adjudication is a nullity.

3 Rem. on Bankruptcy, 2d Ed., p. 120.

*Windsor v. McVeigh*, 93 U. S. 274.

*In Ex parte Lange*, 18 Wall. 163.

*Bigelow v. Forrest*, 9 Wall. 339.

*United States v. Walker*, 109 U. S. 258.

In the case of the *New York Tunnel Co.*, 166 Fed. 284, the court said: "Surely if it appears

from the face of the record that the petitioner in bankruptcy is not a bankrupt, so far as this fact is called to the Court's attention, by any person, though a stranger, the Court will act."

II.

Respondent by his motion to dismiss the petitions to vacate will be deemed to have admitted the truth of the allegations of the petitions. Petitioner N. Rudebeck alleges that the making and filing of the petition in bankruptcy was not authorized by the stockholders and that no notice was ever given to the stockholders of any meeting to be held for any such purpose. He alleges in his affidavit in support of the petition that he proceded diligently to secure a vacation of the adjudication by engaging counsel skilled and learned in bankruptcy law and practice, but was advised by such counsel that the board of trustees and not the stockholders had the power to authorize the admission of insolvency. Petitioner Rudebeck relied on that advice until he filed his said petition to vacate on June 24, 1915. (Record, p. 17.)

Petitioner R. H. Ramsay recites that he is the owner of four thousand shares of the capital stock of the corporation; that the petition in bankruptcy was made and filed without any notice or knowledge and without any meeting of the stockholders, nor was there any notice given by the board of trustees or other authorized persons of any meeting of the stockholders for such purpose or any purpose, and

that said petition in bankruptcy was made and filed without the authorization of the stockholders of said corporation. (Record, p. 24.)

Intervening petitioner Dora A. Ramsay alleges that she is a stockholder and her petition contains substantially the same facts as in the other two petitions relating to lack of notice to stockholders, and that the petition in bankruptcy was filed without authorization from the stockholders. (Record, p. 29.)

The applications to vacate were made to the Hon. Jeremiah Neterer, the judge who made the adjudication in bankruptcy. (Record, p. 16.) He assigned the petitions to vacate for hearing to Hon. Edward E. Cushman, one of the judges in the same district, who entered the said order dismissing the said petitions to vacate. (Record, p. 38.)

We believe that with all of the allegations of no notice to the stockholders and the lack of authorization for the making and filing of the petition in bankruptcy, which allegations stand admitted, and from the further fact that it affirmatively appears from the petition in bankruptcy that the stockholders never authorized the filing of said petition, that the district court should have denied the motions to dismiss and should have vacated the adjudication in bankruptcy of the Nonpareil Consolidated Copper Company.

Respectfully submitted,

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